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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

FELICIA MARIE CRUZ,

Defendant and Appellant.

H040139

(Monterey County

Super. Ct. No. SS131321)

Defendant Felicia Marie Cruz pleaded guilty to second degree burglary. (Pen. Code, § 459.)<sup>1</sup> The trial court granted a three-year term of probation. As relevant here, the trial court imposed probation conditions prohibiting defendant from contacting the victim and forbidding the possession of tools used for the purpose of facilitating a burglary or theft.

On appeal, defendant challenges these probation conditions as vague in the absence of express scienter requirements or the name of a specific victim. She also contends the prohibition relating to the possession of burglary tools is overbroad in violation of her constitutional right to possess property. We agree with defendant that these conditions require explicit scienter requirements and that the victim must be identified. We will modify the conditions accordingly. As modified, we conclude the

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<sup>1</sup> Subsequent undesignated statutory references are to the Penal Code.

conditions do not violate defendant's constitutional rights and we will affirm the judgment.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Facts of the Offense<sup>2</sup>*

On July 2, 2013, police detained defendant based on a report of a stolen credit card. The credit card belonged to Erica Ruano, who reported that her card was used to make unauthorized purchases at a Walmart, a Shell gas station, and a store called Clothing and Things. The bank had notified Ruano of suspicious activity relating to her credit card, including a charge of \$29.32 at Clothing and Things. Police found defendant in possession of a white plastic bag containing recently purchased clothing and one gram of methamphetamine.

Defendant admitted that she had used the stolen credit card to make purchases at multiple locations, including a Walmart and a Shell gas station. A receipt for the clothing items found in the bag was from Clothing and Things in the amount of \$29.32.

### *B. Procedural History*

On July 5, 2013, the prosecution charged defendant by complaint with: Counts One and Three—commercial burglary (§ 459); Count Two—forgery (§ 470, subd. (d)); and Count Four—possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Defendant pleaded guilty to one count of second degree burglary in exchange for a grant of felony probation.

The trial court suspended imposition of sentence and granted a three-year term of probation that included 90 days in county jail as a condition of probation. The court ordered defendant to pay victim restitution to Ruano in the amount of \$307.10. The court also imposed two probation conditions relevant here. In probation condition No. 14, the court ordered defendant to “[h]ave no direct or indirect contact with the victim, including

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<sup>2</sup> The facts are taken from the probation report.

contact by telephone, writing, computer, or through another person.” In probation condition No. 15, the court ordered defendant not to “possess tools used for the express purpose of facilitating a burglary or theft, such as: pry bars, screwdrivers, pick lock devices, universal keys or implements, or other such devices without the express permission of your supervising probation officer.” Defendant lodged no objections.

## **II. DISCUSSION**

### *A. The No Contact Condition*

Defendant challenges the probation condition prohibiting her from contacting “ ‘the victim’ ” on two grounds. First, she contends the condition is unconstitutionally vague because, by using the generic term “the victim,” the condition fails to put her on notice as to any specific person she must not contact. Second, she contends the condition is vague because it lacks an express knowledge requirement.<sup>3</sup> The Attorney General concedes the second argument and submits that the condition should be modified to incorporate a knowledge requirement. As to the first argument, the Attorney General contends defendant forfeited the claim by failing to object on this ground in the trial court below. Alternatively, the Attorney General argues that the condition is not vague because the record shows the victim to be Erica Ruano.

We accept the Attorney General’s concession that the condition should be modified to incorporate a knowledge requirement. We also conclude that defendant did not forfeit her claim as to the vagueness of the term “the victim.” We will modify the condition to incorporate an express knowledge requirement and to specify that the victim is Erica Ruano.

#### *1. Forfeiture*

“Ordinarily, a criminal defendant who does not challenge an assertedly erroneous ruling of the trial court in that court has forfeited his or her right to raise the claim on

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<sup>3</sup> Defendant moved for leave to file a supplemental brief raising this issue. The Attorney General did not oppose the motion. We hereby grant the motion.

appeal.” (*In re Sheena K.* (2007) 40 Cal.4th 875, 880 (*Sheena K.*)). “Applying the rule to appellate claims involving discretionary sentencing choices or unreasonable probation conditions is appropriate, because characteristically the trial court is in a considerably better position than the Court of Appeal to review and modify a sentence option or probation condition that is premised upon the facts and circumstances of the individual case.” (*Id.* at p. 885.) However, an appellate claim amounting to a “ ‘facial challenge’ ” that the phrasing or language of a probation condition is unconstitutional “does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized legal concepts—a task that is well suited to the role of an appellate court.” (*Ibid.*) We review such claims de novo. (*People v. Mendez* (2013) 221 Cal.App.4th 1167, 1172.)

Defendant’s claim here amounts to a purely facial challenge. On its face, the probation condition uses the term “the victim” without specifying or naming an individual. We need only examine the language of the condition itself to determine whether it is unconstitutionally vague. Moreover, while we rely on the record to fashion a remedy as set forth below, we can do so without resolving any factual disputes or engaging in the type of fact finding that occurs in the trial courts. Accordingly, we conclude defendant has not forfeited her claim.

## 2. *Vagueness*

“[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ ” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) “A probation condition ‘must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,’ if it is to withstand a challenge on the ground of vagueness.” (*Ibid.*) That is, the defendant must know in advance when he or she may be in violation of the condition.

Defendant argues that the no contact condition is vague on its face because she does not know whether “the victim” refers to some person or one of the stores where she

made unauthorized purchases, e.g. Walmart. We agree, and this court has previously held such conditions to be defective. (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 594 [condition suffered from a fatal ambiguity in that it did not actually designate from whom defendant should stay away].) However, we also agree with the Attorney General that a cursory examination of the record demonstrates that “the victim” in this instance is Erica Ruano. The probation report—signed by the trial court—unequivocally refers to Ruano as the victim in multiple instances, and the report identifies no other victims. The trial court explicitly adopted certain probation conditions set forth in the report, including those naming Ruano as the victim and requiring defendant to pay victim restitution to Ruano. The court stated: “You’re to pay victim restitution pursuant to stipulation to Erica Rios Ruano, R-u-a-n-o, in an amount of \$307.10, pursuant to 1202.4.” At no time did the trial court identify any other victim.

Accordingly, we will order the condition modified to name Erica Ruano as the victim. Furthermore, we will accept the Attorney General’s concession as to the need for a scienter requirement. Courts often order modification of probation conditions to incorporate a scienter requirement where a probationer could unknowingly engage in the prohibited activity. (*People v. Moses* (2011) 199 Cal.App.4th 374 [modifying probation conditions to include both actual and constructive knowledge requirements]; *People v. Turner* (2007) 155 Cal.App.4th 1432 [modifying a condition to require that defendant must either know or reasonably should know that persons are under 18 before he is prohibited from associating with them]; *In re Kacy S.* (1998) 68 Cal.App.4th 704, 713 [modifying probation condition that defendant not associate with any persons not approved by his probation officer].) Therefore, we will order the condition modified to incorporate an express knowledge requirement.

*B. Prohibition on Possession of Tools Used for a Burglary or Theft*

Defendant challenges the condition prohibiting her from possessing tools used for a burglary or theft on two grounds. First, she contends the condition is unconstitutionally

vague absent an express scienter requirement. Second, she argues that the condition is overbroad in violation of her constitutional right to possess property. The Attorney General argues that defendant forfeited her claim by failing to object below.

Furthermore, the Attorney General contends that the condition already incorporates an implicit scienter requirement—possession of the prohibited items with the intent set forth in section 466 [prohibiting possession of burglary tools “with intent feloniously to break or enter” into buildings or other specified places].

We conclude that defendant has not forfeited her claim, and we will modify the condition to include an express scienter requirement consistent with section 466. We also conclude that the condition as modified is not overbroad and does not violate defendant’s constitutional right to possess property.

#### 1. *Forfeiture*

As explained above, a purely facial challenge to the constitutionality of a probation condition is not forfeited by the failure to object below. (*Sheena K.*, *supra*, 40 Cal.4th at p. 885.) The Attorney General contends that this exception to forfeiture does not apply here because the probation condition does not implicate defendant’s fundamental rights. For this proposition, the Attorney General relies on *People v. Olguin* (2008) 45 Cal.4th 375 (*Olguin*). But the court in *Olguin* did not hold that the defendant had forfeited his claim. To the contrary, the court ruled on the merits of Olguin’s claim notwithstanding its holding that the probation condition at issue did not impinge on his constitutional property rights. (*Id.* at pp. 384-385.) And the court in *Sheena K.* made clear that a purely legal challenge based on a claim of overbreadth in violation of a constitutional right falls within its exception to forfeiture. (*Sheena K.*, *supra*, 40 Cal.4th at p. 888.) Here, defendant’s claim meets those criteria, so we will consider the merits of her claim.

## 2. *Scienter and Overbreadth*

“There is a constitutional right to possess property.” (*People v. Freitas* (2009) 179 Cal.App.4th 747, 751 [citing Cal. Const., art. I, § 1].) “ ‘ “Where a condition of probation requires a waiver of constitutional rights, the condition must be narrowly drawn. To the extent it is overbroad, it is not reasonably related to a compelling state interest in reformation and rehabilitation and is an unconstitutional restriction on the exercise of fundamental constitutional rights.” ’ [Citation.]” (*People v. Garcia* (1993) 19 Cal.App.4th 97, 101-102.) Furthermore, “the law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of a [prohibited item].” (*People v. Freitas, supra*, 179 Cal.App.4th at p. 752.) Accordingly, courts often impose scienter requirements on probation conditions restricting the possession of property. (*Ibid.* [modifying probation condition to prohibit *knowing* possession of a firearm or ammunition]; *In re Victor L.* (2010) 182 Cal.App.4th 902, 912-913 [modifying probation condition to prohibit *knowing* presence of weapons or ammunition].)

We agree with defendant that the condition as worded fails to impose a scienter requirement on her. The condition prohibits the possession of “tools used for the express purpose of facilitating a burglary or theft.” The Attorney General contends that this verbiage defines the scienter required to violate the condition. But the phrase “used for the express purpose of” modifies the word “tools,” not defendant’s knowledge that she is in possession of the tools. Furthermore, the condition specifies tools such as pry bars and screwdrivers, which are generally used for purposes other than facilitating a burglary or theft. The condition as worded thereby prohibits defendant from possessing tools such as screwdrivers, even if she intends to use them solely for innocent, non-prohibited purposes, unless she obtains the approval of her probation officer. And defendant cannot reasonably be required to know whether any given tool she might possess is a “tool[] used for the express purpose of facilitating a burglary or theft” for which she would be required to seek approval.

However, we also agree with the Attorney General that this probation condition, based on its wording, was intended to mirror section 466. “A probation condition should be given the same interpretation as a statute it implements so long as the wording is substantially similar, even if the condition does not incorporate the statute by reference.” (*People v. Rodriguez, supra*, 222 Cal.App.4th at p. 591.) Section 466 prohibits the possession of burglary tools “with intent feloniously to break or enter into any building, railroad car, aircraft, or vessel, trailer coach, or vehicle as defined in the Vehicle Code.” (§ 466.) Based on the precise wording of the probation condition imposed by the trial court here—which appears to express a somewhat differently defined purpose—it is not clear that the condition explicitly includes the scienter written into section 466. (Cf. *People v. Rodriguez, supra*, at p. 592 [holding the scienter requirement of the penal code provision to be implicit in the probation condition].) Accordingly, we will modify the challenged condition to define the tools described in the probation condition explicitly as those defined under section 466.

As modified, the condition is not overbroad in violation of defendant’s right to possess property. “The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.” (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.) By only prohibiting tools that are possessed with the intent to feloniously break and enter, the restriction is sufficiently narrowed to serve the purposes of the condition while imposing minimal burdens on defendant’s property rights.

### **III. DISPOSITION**

Probation condition No. 14 is modified as follows: “Have no knowing direct or indirect contact with Erica Ruano, including contact by telephone, writing, computer, or through another person.” Probation condition No. 15 is modified as follows: “Do not



possess a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, or other instrument or tool with intent to feloniously break or enter into any building or vehicle.” As modified, the judgment is affirmed.

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Márquez, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Grover, J.